has been made to P.W.3 in the wording of the advertisement and P.W.3's occupation and Chinese standard of qualification. I am of the opinion that this examination is not relevant to the material fact of the charge made against them. The charges are that the accused have advertised in their daily newspaper two advertisements which would result that any persons following this advertisement can procure any obscene pictures from the two names given and addresses mentioned as stated and published in the advertisement in their daily newspapers. ....P.W.2 has described to the court how these obscene photographs were being procured by him by means of Registered post and there are no questions from either accused to contest the manner in which these obscene photographs being procured and produced before this court as exhibits. I hold the view that the mere fact that the accused are the proprietors and publisher of a newspaper is not sufficient to render them criminally liable in respect of matter inserted therein by one of their servants. In this particular case, I find that the two accused although they are existing registered proprietors of Hwa Lian Newspaper, have neglected their duty because as it is clearly shown that by their own admission not until their attention being drawn by P.W.2. From the above reason, I find that the photographs are obscene, though advertisement can be procured from or through any persons and in this case through Mr. Yee Sim and Miss Kam Lin. The publication of these advertisements is due to the negligence of the two accused who are the registered proprietors of Hwa Lian Newspaper, Printers and under the Registration of Business. Name of Hwa Lian Daily News. There are no other persons being registered except the two accused. I find the two accused guilty to both charges against them."

Now, as I read the judgment, it seems that the magistrate's views were:

(1) P.W.2 and P.W.3 were both to be regarded as expert witnesses. As P.W.2 was not cross-examined, and P.W.3's qualifications only as translator were questioned therefore their evidence should be accepted in toto.

(2) Appellants were not vicariously liable, but ignorance even of the existence of the advertisements could not be counted in their favour.

(3) Section 292 was contravened, because a person who answered the advertisement in fact received obscene photographs, and appellants were negligent because they did not know of this state of facts until after prosecution.

As I have already said, the proper test is: Do the advertisements by their wording proclaim that obscene objects (photographs) can be procured? It is because the magistrate did not apply this test that I think he went astray. If he had properly directed himself, he might well have concluded that the wording of the advertisements did not promise what was unlawful.

For the above reasons, this appeal is allowed. The convictions are quashed on both counts, and sentences set aside. Fines, if paid, must be returned to the appellants. I agree with the order that the photographs be destroyed.

Appeal allowed.

LIM TOH SIN v. PUBLIC PROSECUTOR

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) February 10, 1966]

[Singapore — Federal Court Criminal Appeal No. 43 of 1965]

Criminal Law and Procedure — Trial — Misdirection — Failure to put defence to jury — Courts of Judicature Act, 1964, s. 60 — Criminal Procedure Code, (Cap. 132), s. 166.

The appellant had been convicted for murder. The evidence showed that two persons, one of whom was armed with a gun, took part in a robbery. A detective chased the robbers and while holding one of them he was shot by the other. The issue before the jury was whether the appellant was the robber who shot the deceased. The appellant made a statement admitting to participating in the robbery but stating that he took an inactive part in it. The learned trial judge did not put the defence to the jury and in his summing up he stated that if the jury were satisfied that the appellant was the other robber, that is not the gunman, then it was open to them to find him not guilty of murder.

Held: (1) the summing up in this case was unsatisfactory and there had been a grave misdirection by the trial judge;

(2) by reason of misdirection and the failure to put the defence to the jury on the facts of this particular case the appellant had lost a chance of being found not guilty of murder which was fairly open to him and therefore the conviction for murder must be quashed;

(3) the evidence in this case established beyond any reasonable doubt that the appellant had committed the offence of armed robbery and the court would therefore convict him of that offence.

Cases referred to:—

(1) *R.* v. *Haddy* [1944] K.B. 442; 29 Cr.App.R. 182.

(2) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 at p. 482; 25 Cr.App.R. 72 at 92.

(3) *Stirland* v. *Director of Public Prosecutions* [1944] A.C. 315; 30 Cr.App.R. 40.

(4) *R.* v. *Farid* 30 Cr.App.R. 168.

(5) *Begu* v. *King Emperor* A.I.R. 1925 P.C. 130.

(6) *Quinn and Howland* v. *R.* [1949] M.L.J. 217, C.C.A.

FEDERAL COURT.

Khoo Hin Hiong for the appellant.

Francis T. Seow (Senior State Counsel) and *Dalip Singh* (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (Singapore): The appellant was convicted before Winslow J. at the High Court of the murder of a detective Reddy Melvyn Douglas.

The facts of the case so far as it is necessary to state them are these. On the morning of 11th April 1964 two employees of a trading company after cashing a $60,000 cheque returned to the office of the company, one of them Chang Meng Chye carrying the cash in an airways travelling bag. As they alighted from a taxi

which had stopped in front of the building in which the office was situated at Collyer Quay two persons, one of whom was the appellant, rushed at him. Eventually the two robbers, one of whom was armed with a gun, obtained possession of the bag containing the money and ran off down De Souza Street and into Prince Street where they tried to make their getaway with a motor scooter parked along Prince Street.

Chang Meng Chye chased the robbers but always keeping a safe distance from them because according to him one of them was armed with a gun. While one of the robbers was attempting to start the scooter, the deceased, who was in a tailor's shop on the first floor of a building in Prince Street and had noticed something unusual in the street below, rushed down into the street and caught hold of this robber by the shirt. The other robber approached the deceased from behind a nearby pillar and shot the deceased twice.

According to Chang Meng Chye this robber was then carrying the stolen bag and after pointing a gun at the deceased for about 30 seconds shot him from a distance of 3 feet and he witnessed this tragic scene about 30 feet away, from the other side of Prince Street. Chang Meng Chye, at an identification parade held on 7th December 1964 i.e. about 8 months after the shooting, identified the appellant as the robber who fired the shots at the deceased and at the trial he said that he was positive that he identified the right person because when he saw the actual shooting the incident was very deeply impressed into his mind. In cross-examination he said that the only unusual feature of the person who shot the deceased was the fact that he had bushy eye-brows.

At the trial two other witnesses identified the appellant as the person who shot the deceased. One of them Bupendra was with the deceased at the tailor's shop when the deceased rushed down into Prince Street. Bupendra remained where he was and saw from the first floor the deceased catch hold of the robber who was attempting to start the scooter and saw the other robber take a gun from a bag at which moment he shouted out to warn the deceased and then he rushed down from the first floor. As he was running down he heard the sound of two shots being fired and as he got into Prince Street he saw two Chinese running in the direction of Collyer Quay. He followed them, saw them get into a taxi and then saw them get out of the taxi and run into Change Alley. He continued to follow them but before he could enter Change Alley one of them came out of Change Alley straight into his arms and he caught hold of this robber who was carrying a bag. However because this robber managed to pull out a gun from his trouser pocket, Bupendra released him and thereupon the robber jumped into a parked taxi which had a woman passenger in it and at gun point forced the taxi driver to drive off. Bupendra failed to identify the appellant at an identification parade held by the police in December 1964 but did so at the preliminary inquiry held at the 9th Magistrate's Court in January 1965 when the appellant was alone in the dock.

When questioned at the trial Bupendra said that the only distinguishing feature of the person he saw pointing a gun at the deceased was that he was a bit dark, darker than the person who was attempting to start the scooter, and that the reason he could not identify him at the identification parade was because he was then in a group of people.

The other witness called by the prosecution who identified the appellant as the gunman was a ship's officer Cecil Farleigh Theseira. His evidence was that on the morning of the day in question he was walking along Prince Street towards Collyer Quay when he noticed some people in a building on the other side of the street pointing out something behind him and as he was turning round to look back he heard the sound of two shots being fired rapidly and of a falling scooter. When he had turned completely round he saw a dark male Chinese running towards him with a pistol in his hand a bag slung across his shoulder. The witness said he was frightened, panicky and was looking for a way out, but he noticed the gunman running in the direction of Change Alley. He said immediately after the incident he was shown by the police a book of photographs and picked out 2 photographs of 2 persons who looked like the gunman. He said he attended an identification parade held by the police soon after the incident but picked no one at that parade. He said he did not attend any identification parade in December 1964. He however like Bupendra identified the appellant at the preliminary inquiry but the appellant was not one of the two persons whose photographs he had earlier picked out.

The only other material witness on the identity of the robber who shot the deceased was a woman cake seller Too Ching Tim who had a pitch on the five-foot way at the corner of De Souza Street with Collyer Quay. On the morning of 11th April 1964 she heard a commotion and saw two persons running past her, one carrying a bag slung over his right shoulder. One of them was slightly taller than the other and this taller person had the bag slung over his shoulder. None of them were wearing sun glasses or carried any arms.

About 15 minutes before they ran past her she had noticed this taller person seated on an electrical power box which was also on the five

foot way but behind her pitch and wearing sun glasses.

She was never called by the police to try to identify the two persons who ran past her but at the trial when asked whether she could identify the appellant as one of the two persons she saw running past her she said she could not and that the man who was seated at the electrical power box did not look like the appellant. She also stated that the appellant bore some resemblance to the shorter of the two persons who ran past her.

The only defence put forward throughout the trial was that the appellant although taking part in the robbery was the robber who was attempting to start the scooter when the deceased was shot by the other robber.

The sole issue therefore for the jury was whether the prosecution had proved beyond reasonable doubt that the appellant was the robber who came up from behind the pillar and shot the deceased while the deceased was holding on to the other robber.

The trial judge after summing up the evidence of the material witnesses as to identity then went on to direct the jury thus:

"Now, if you are not satisfied that the accused is the gunman and that he fired the shots, if you think that on Too Ching Tim's evidence on the similarity between the accused and the other man who was not armed, it will be open to you to return a verdict, if you are not satisfied with the identification of him as the gunman, and if you are satisfied on his own admission he said he was there but that he was the other man, it will be open to you to find him not guilty."

The appellant at the trial elected to make a statement from the dock admitting to participating in the robbery because he was forced to do so by the other. The gist of his statement was that he took an inactive part in the robbery being the one who rode the scooter, and on the incident of the shooting his statement was as follows:

"He managed to get hold of the bag and then came out. He then asked me to run, so I followed him. When we arrived at the place where the scooter was parked, he asked me to start it. I pushed the scooter back. I was standing on the off side of the scooter. I attempted to start the scooter, but it did not work. A male Indian came, and with his left hand he caught hold of my shirt in front. With his right hand he caught hold of my left wrist. I heard two shots. My friend ran away. He asked me to run. I did so. The scooter fell down. I followed him."

At no stage of the summing-up to the jury did the trial judge put this specific defence to the jury for their consideration nor did the trial judge direct the jury that they must consider the whole of the evidence given at the trial when deciding whether the prosecution had proved beyond reasonable doubt the guilt of the appellant. Furthermore in that passage of the trial judge's summing-up we have quoted it would appear that the jury were directed that they must be satisfied that the appellant was the other man (meaning the man who was not the gunman) before it was open to them to find him not guilty of murder which in our opinion was a grave misdirection.

We are therefore of the opinion that the summing-up was unsatisfactory and that there was misdirection on the part of the trial judge. The next question we have to consider is whether we ought to apply the proviso to section 60 of the Courts of Judicature Act 1964 on the ground that we consider no substantial miscarriage of justice has occurred.

The law as to the circumstances under which the court ought or ought not to apply this proviso is we think correctly stated in *Archbold's* Criminal Pleading & Practice (35th Ed.) paragraph 939 where it is stated: "A substantial miscarriage of justice within a meaning of the proviso has occurred where by reason of a mistake, omission or irregularity in the trial the appellant has lost a chance of acquittal which was fairly open to him. The court may apply the proviso and dismiss the appeal if they are satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty. *R.* v. *Haddy* [1] where the *dictum* of Lord Sankey L.C. in *Woolmington* v. *Director of Public Prosecutions* [2] to the effect that the test is whether "if the jury had been properly directed they would inevitably have come to the same conclusion" is commented on and explained. *R.* v. *Haddy* (*ante*) was cited with approval by the House of Lords in *Stirland* v. *Director of Public Prosecutions,*[3] and by the Court of Criminal Appeal in *R.* v. *Farid.*[4]

We have considered the facts of this case and the evidence given at the trial. As we have said the only issue was one of identity. The identification by Theseira and Bupendra was clearly unsatisfactory so that we are left with the identification by Chang Meng Chye. However on the evidence of this witness bearing in mind the evidence of Woo Ching Tim we are unable to say that the evidence for the prosecution was overwhelming or that we are satisfied on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty of murder. It seems to us that by reason of misdirection and the failure to put the defence to the jury on the facts of this particular case the appellant has lost a chance of being found not guilty of murder which was fairly open to him.

We would accordingly allow the appeal in so far as the conviction of the offence of murder is concerned.

There remains for consideration however whether on the facts of the case and on the evidence given at the trial this court is entitled

and ought to act under the provisions of section 166 of the Criminal Procedure Code. Clearly evidence established beyond any reasonable doubt that the appellant had committed the offence of armed robbery and on the authority of the Privy Council case of *Begu* v. *King Emperor* [5] which the Singapore Court of Criminal Appeal held to be binding on it in the case of *Quinn and Howland* v. *Rex* [6] we convict the appellant of the offence of armed robbery.

We quash the conviction of the offence of murder and set aside the sentence of hanging but we convict the appellant of the offence of armed robbery.

Order accordingly.

Solicitors: *Chor Pee & Hin Hiong.*

PEOPLE'S INSURANCE CO. LTD. v. KHOO TIANG SENG

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) February 10, 1966]

[Singapore — Federal Court Civil Appeal No. 118 of 1964]

Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960, s. 8(1) — Liability of insurers — Judgment against driver of motor vehicle — Whether driver was driving motor vehicle on order or with the permission of the insured.

Insurance — Third-party risks — Liabiltiy of insurers.

This was an appeal against the judgment of Choor Singh J. reported at [1965] 2 M.L.J. 16. The appellants claimed that the driver at the time of the accident was not driving the car with the owner's permission. The learned judge held that on the facts the inference was that the driver had the implied consent of the owner to go to lunch on his way to return the car to the owner.

Held: on the facts and in the circumstances of this case where the insured in parting with the control of the car without any definite prohibition as to the nature of its use to a person, who thereupon uses it for a purpose for which he had used it on previous occasions with the insured's knowledge and without the insured's expressed disapproval, it must be held that the insured had given permission to that person to use the car for the purpose for which it had been used on previous occasions.

[Editorial note: The Honourable the Lord President who presided at the hearing of the appeal did not partake at the Federal Court when delivering the reserved judgment in Singapore.

FEDERAL COURT.

Dennis Lee for the appellants.

Robert Yap Tyou Min for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (Singapore): The respondent who was injured in a road accident due to the negligent driving by one Chua Ou Chye of a motor car SP. 5034 and had obtained an unsatisfied judgment against him for damages sued the appellants, the insurers of the motor car, by virtue of section 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Ordinance, 1960.

The appellants had issued a policy covering third party risks in respect of the car in the name of Yew Seng & Co., of which a Mr. Ah Bah was the proprietor, as the insured. The policy contained a clause of a common type whereby the insurers undertook to indemnify any "authorised driver" driving the motor vehicle and the policy defined "authorised driver" to include any licensed driver "who is driving on the policy holder's order or with his permission".

The appellants resisted the action on the ground that Chua at the time of the accident was not driving the car with Ah Bah's permission.

The facts were that Chua, a motor mechanic, was asked by Ah Bah on the day of the accident to do some repairs to Ah Bah's car. Chua had on previous occasions done repair work to the car for Ah Bah and on two such previous occasions he had used the car entrusted to him for repairs to go for lunch. On neither of these occasions had he obtained Ah Bah's prior permission but had subsequently informed Ah Bah who raised no objections to such use.

Chua collected the car, drove it to his workshop, did the repairs, took it for a test run and returned with it to his workshop intending to return it to Ah Bah later on.

Accordingly towards the lunch hour with two friends in it he drove the car with a view to returning it to Ah Bah but on the way he and his friends decided to have lunch before returning the car. They deviated from the normal direct route to Ah Bah's premises and it was then that the accident occurred.

The trial judge on this evidence said that "the inference seemed irresistible" that there was implied permission on the part of Ah Bah for Chua to use the car to go to lunch on the day of the accident and held that Chua was driving the car at the time of the accident with the policy holder's permission within the meaning of the policy and gave judgment in favour of the respondent.

The appellants now appeal against this judgment contending that as the respondent had to prove that at the time of the accident, after Chua had deviated from the normal route from the garage to the insured's premises for his own private purpose, Chua had the insured's permission to drive the car, the trial judge had erred on the facts in coming to the conclusion that Chua was then driving the car with the insured's permission.

It is settled law that an appellate court is not precluded from coming to a different conclusion from a trial judge on any matter of fact more particularly where the finding is based on